

FILED
STATE OF ALASKA
THIRD JUDICIAL DISTRICT
ANCHORAGE
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

SUNNY RADEBAUGH, FRED SINYON,
JANIS PRINCE, JANICE MONIGOLD,
RACHEL OKBAOK, THEODORE HILGART,
GRACIE SATTERWHITE, MATTIE
GODFREY, MAXINE MORGAN, NOEL
HALVERSON, MARIAN RUTH DAVIS,
EDNA BUTZ, FLOSSIE FOLEY, AND RUBY
KRAUSE

Plaintiffs,

vs.

STATE OF ALASKA, DEPARTMENT
OF HEALTH AND SOCIAL SERVICES,
Karleen Jackson, in her official capacity as
Commissioner for the Department, DIVISION
OF SENIOR AND DISABILITIES SERVICES,
and Rod Moline, in his official capacity as
Director of the Division,

Defendants.

CLERK TRIAL COURTS

BY: DEPUTY CLERK

Case No. 3AN-07-8565 CI

SETTLEMENT AGREEMENT

The parties, by and through their respective counsel of record, hereby stipulate and agree as follows in full settlement of the above-entitled action:

1. The named plaintiffs are disabled Medicaid beneficiaries and participants in the State of Alaska's Personal Care Attendant ("PCA") program. The purpose of the PCA program is "to enable an individual, of any age, whose needs would otherwise result in placement in an acute care hospital or nursing facility or

loss of that individual's employment solely related to activities of daily living (ADL) to remain at home or prevent job loss." 7 AAC 43.750.

2. The PCA program provides eligible recipients with assistance in performing the various ADLs, such as bathing, dressing, toileting, eating, transfers, and care of the mouth, hair, nail care as well as assistance with various instrumental activities of daily living (IADLs), such as housekeeping, shopping, laundering bed linens and clothing, meal planning and preparation, assistance with taking vital signs, simple wound care, assistance with administering routine medications, and travel to and from medical and dental appointments. *See* AAC 43.752.

3. Under state regulations, any person who is eligible for Medicaid can apply to receive PCA services. In order to become eligible for PCA services, the applicant must be seen by a state assessor who observes the applicant in their own home, and scores their needs with ADLs and IADLs using the Personal Care Assessment Tool (PCAT). This assessment tool establishes eligibility for PCA and is also used to establish a service plan that authorizes the scope and duration services for each eligible applicant. Once eligible for services, the applicant must be assessed every year in order to maintain eligibility. *See* 7 AAC 43.750 and 7 AAC 43.751. Under current regulations, a recipient must need extensive assistance with at least one ADL, and limited assistance with at least one other ADL, as shown by the individual's PCAT. *See* 7 AAC 43.750 This translates into at least one 3/2 and one 2/2 in scores on the PCAT. Additionally, under the current regulation, if the

consumer's score only shows a need for assistance in IADLs, the consumer is found ineligible for PCA services.

4. On July 16, 2007, the plaintiffs filed suit against the state seeking injunctive and declaratory relief alleging the process for denying and/or terminating a recipient of Personal Care Services were arbitrary and capricious and violated the Alaska Administrative Procedures Act and the federal Medicaid Act. Specifically, that the failure of the state to consider whether a person's inability to perform a single ADL or any of the IADL's would result in the individual's placement in an acute care hospital, nursing facility or would result in job loss.

5. An amended complaint was filed on August 28, 2007, which contained the same basic allegation, but named three additional plaintiffs.

6. On October 4, 2007, the plaintiffs filed a motion for temporary restraining order and preliminary injunction. The state filed a motion for judgment on the pleadings. The relief sought was to enjoin the state from using the PCAT to terminate anyone from the PCA program on the sole basis of the PCAT, and for an order that would preclude the use of the PCAT for any purpose.

7. On January 14, 2008, the court granted the motion for temporary restraining order and preliminary injunction on other grounds that 7 AAC 43.751(g) required the state to engage in an additional inquiry, in addition to conducting the personal care assessment with the client prior to terminating or denying anyone from the PCA program.

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8. In October of 2008, the parties submitted status reports to the court indicating their positions on the status of the case; the state believed the matter was concluded, whereas plaintiff has contended there was still more to litigate. The court ordered plaintiffs to file an amended complaint, which they did.

9. Plaintiffs filed the third amended complaint on December 1, 2008. The complaint was similar in tone and context of the previously filed complaints, adding additional plaintiffs and focusing on whether the state properly determined eligibility for services. Specifically, the third amended complaint alleged that the state acted in an arbitrary and capricious manner when denying or terminating services for person who showed need for only a single ADL and IADLs.

10. On August 12, 2009, the Division amended its eligibility criteria for personal care assistant services. Under this new eligibility criteria, any Medicaid eligible consumer who has received scores 2/2 or greater on any single ADL and/or anyone who scores a 1/3 or greater on any single IADL is eligible for PCA services provided that the consumer's medical diagnosis form and any additional information provided supports the need for services. A consumer who receives scores of zero(s), one(s), five(s) or eight(s) on ADLs, or zero(s) or eight(s) on IADLs would not be eligible for PCA. This policy is set forth in Exhibit A to this agreement.

11. Since October of 2009, the parties have been engaged in comprehensive settlement discussions related to the third amended complaint.

12. The state does not admit nor agree to plaintiff's contentions or other allegation contained in the complaint, but wishes to resolve this dispute.

The plaintiffs, by and through Nikole Nelson of Alaska Legal Services Corporation, and defendants, by and through Chief Assistant Attorney General Stacie L. Kraly, hereby agree to the settlement of all claims raised in this action on the following terms and conditions:

A. The state will continue to use the Personal Care Assessment Tool, which is adopted by reference in the state administrative code but in determining eligibility for PCA services the state agrees it will:

- i. Establish in the narrative portion of the assessment an accurate reflection of the consumer's condition for the previous 12 months. In determining eligibility, the State shall consider whether the consumer's needs at the time of assessment are an accurate reflection of the consumer's average needs over the past twelve months. If it does not, the assessment and service plan shall be adjusted accordingly to authorize the highest level of service necessary to address the consumer's average needs over the past twelve months. After the consumer and/or the consumer's care providers are presented with the assessment and, if appropriate a service plan, the consumer, the consumer's legal representative, or the consumer's care providers may

- submit in writing to the State a statement indicating that they concur that the assessment accurately reflects the consumer's condition over the past 12 months;
- ii. review the medical diagnosis form and any additional information provided by the consumer's treating physician, physician's assistant or advanced nurse practitioner prior to conducting the assessment,
 - iii. assess current needs of the consumer to determine what, if any, support would be necessary without any assistive devices (including but not limited to those listed in Section S, p. 11 of the PCAT) or formal or informal supports (including but not limited to those listed in Section W, p. 11 of the PCAT) present at the time of assessment.
 - iv. The state will continue to use the new eligibility criteria as set forth in paragraph 10 of this agreement.

B. This agreement is based upon regulations and process that exist under the personal care regulation adopted on April 1, 2006, and policies and procedures adopted thereafter. Nothing in this agreement precludes the state from amending or changing the aforementioned PCA regulations so long as those changes are made pursuant to the Alaska Administrative Code. Nothing in this agreement precludes

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For my that on 27 Jan 2010 a copy
of the above was delivered to
each of the parties at their offices of record
Sullivan
Alaska

Nelson
Kraly

counsel for plaintiffs from challenging any changes made to the the PCA service program in the future.

C. The state agrees that the plaintiffs are the prevailing parties for the purposes of costs and attorneys fees.

D. The parties agree that the amount of costs and attorneys fees shall be determined by the Court. Within 30 days of the date this agreement is executed, plaintiffs shall file a motion with the court seeking an award of costs and attorneys fees. This deadline may be extended by mutual agreement of the parties.

DANIEL S. SULLIVAN
ATTORNEY GENERAL

DATED: 1-27-10

for By:

Kimberly J. Kraly
AK BAR NO. 0305014
Stacie L. Kraly
Chief Assistant Attorney General
Alaska Bar No. 9406040

ALASKA LEGAL SERVICES CORP.
Attorneys for Plaintiffs

DATED: 1/26/10

By:

Nikole Nelson
Alaska Bar No. 9906033

IT IS SO ORDERED.

DATED: 28 Jan 2010

William F. Morse
Superior Court Judge